



Issue Date: 24 September 2015

CASE NO.: 2015-STA-00001

In the Matter of:

KELLY SORENSON,
Complainant,

vs.

TERRACARE ASSOCIATES, LLC,
Respondent.

APPEARANCES:

AUSTIN EGAN, Esq., and
ADAM CLARK, Esq.,
For the Complainant.

SUSAN M. SCHAECHER, Esq.,
For the Respondent.

BEFORE: CHRISTOPHER LARSEN
Administrative Law Judge

DECISION AND ORDER DENYING CLAIM

This is a claim under the Surface Transportation Assistance Act, 49 U.S.C. §31105 (“the Act”), heard in Salt Lake City, Utah, on May 18-19, 2015. At the hearing, I received in evidence Joint Exhibits (JX) 1 through 9 and Respondent Terracare’s Exhibits (RX) R-2, R-3, R-5, R-7, R-8, R-9, R-11, R-13, R-18, R-21, R-25, and R-28. I heard testimony from witnesses Ryan Pepper, Tiffany Brackamonte, Michelle Robertson, William Winfield, Kelly Sorenson, Sawyer Goff,¹ Peter Keil, Bryan Kunkel, and Philip Felix. Both parties submitted Post-Hearing Briefs thereafter, which I have read and carefully considered.

¹ Mr. Goff testified by telephone over Complainant’s objection (TR p. 236, line 23-p.237, line 2), but I have not relied on that testimony to reach any of the conclusions set forth in this decision.

Respondent Terracare Associates, LLC (“Terracare”), provides snow removal and other roadway-maintenance services to local governments. In 2013, it began, for the first time, to operate within the State of Utah, having secured a contract with the City of Cottonwood Heights. Terracare hired the Complainant, Kelly Sorenson, as a foreman for its new Utah operations, and he began working on October 28, 2013, one of five full-time Terracare employees in Utah. The contract with the City of Cottonwood Heights began on November 1, 2013. Terracare terminated Mr. Sorenson’s employment on November 13, 2013. During his brief employment, Terracare primarily hired and trained local contract drivers it would use in Utah later in the season, although, on two occasions, Terracare performed some work in the field. Mr. Sorenson contends Terracare terminated him in violation of the Act, which provides:

A person may not discharge an employee, or discipline or discriminate against any employee regarding pay, terms, or privileges of employment, because –

(A)

...

(ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order

49 U.S.C. §31105, subsection (a). The purpose of this statute is “to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles.” *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 95 L.Ed.2d 239, 107 S.Ct. 1740 (1987). “Congress recognized that employees in the transportation industry are often best able to detect safety violations and yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting those violations.” *Ibid.*

For purposes of the statute, an employee files a complaint when he communicates a violation of a commercial motor vehicle regulation, standard or order to any supervisory personnel. *Harrison v. Roadway Express, Inc.*, ARB No. 00 048, ALJ No. 1999 STA 37 (ARB Dec. 31, 2002). It is not necessary for a complainant to identify any particular commercial motor vehicle safety standard when he or she makes such a report. *Nix v. Nehi-RC Bottling Company, Inc.*, 84-STA-1 (Sec’y July 13, 1984), slip op. at 8-9. During his employment with Terracare, Mr. Sorenson’s direct supervisor was Bryan Kunkel. Mr. Kunkel’s supervisor was Bill Winfield. The oth-

er three Terracare employees in Utah – mechanic Peter Keil, foreman Sawyer Goff, and laborer Philip Felix – did not supervise Mr. Sorenson.²

To prove unlawful activity under the Act, a complainant must show 1) that he engaged in protected activity, 2) that the employer knew of the protected activity, 3) that the complainant suffered an adverse employment action amounting to discharge or discipline or discrimination regarding pay, terms, privileges of employment, and 4) that the protected activity was a contributing factor in the adverse employment action. *Ferguson v. New Prime, Inc.*, ARB No. 10-75, ALJ No. 2009-STA-47, p. 3 (ARB August 31, 2011); *Clarke v. Navajo Express, Inc.*, ARB No. 09-114, ALJ No. 2009-STA-018, p. 4 (ARB June 29, 2011).

Mr. Sorenson asks me to award monetary damages for lost wages totaling \$77,327.66 through May 18, 2015; medical expenses of \$2,647.98; pre- and post-judgment interest; and attorney fees and court costs (Complainant’s Post-Hearing Brief, pp. 15-17). He does not seek reinstatement or request any other relief.

I. COMPLAINANT WAS AN AT-WILL EMPLOYEE

Respondent contends (Respondent’s Closing Brief, p. 3; TR p. 200, lines 3-13; *see also* RX 2, p. 11), and Mr. Sorenson does not deny, that he worked for Terracare as an at-will employee. Under Utah law, an at-will employee “can be terminated for any reason whatsoever so long as the termination does not violate a state or federal

² As set forth below, Mr. Sorenson testified to direction he had received from “all three of [his] bosses” (TR p. 112, lines 21-22), with the suggestion that he regarded mechanic Peter Keil as a “boss.” Elsewhere he describes Mr. Keil as a “supervisor” (TR p. 101, lines 4-13). But his written job description (JX 1) indicates a foreman reports to the “Field Supervisor.” Terracare Human Resources Director Michelle Robertson testified Bryan Kunkel was Mr. Sorenson’s direct supervisor, identifying Mr. Kunkel as “project manager for the Cottonwood Heights project” (TR, p. 43, lines 6-11). Mr. Kunkel, whom Terracare fired in December, 2013, also testified that during Mr. Sorenson’s employment, he was Mr. Sorenson’s supervisor (TR p. 278, lines 14-18), and, like Ms. Robertson, gave his title during Mr. Sorenson’s employment as “project manager” (TR p. 277, lines 13-22). He further testified that when he was hired, there were five Terracare employees in Utah: Mr. Kunkel himself; Bill Winfield, his supervisor; Mr. Sorenson; a second foreman, Sawyer Goff; and mechanic Peter Keil (TR p. 279, lines 7-15). William Winfield, now Terracare’s Director of Operations, testified that his title during Mr. Sorenson’s employment was regional manager of the Cottonwood Heights project (TR p. 64, lines 9-16), in which capacity Mr. Winfield was Mr. Kunkel’s supervisor (TR p. 65, lines 8-12). Mr. Winfield likewise referred to Mr. Kunkel as a “project manager” (TR p. 65, lines 8-10). Tellingly, according to Mr. Winfield, in testimony which no other witness contradicted, it was Mr. Kunkel who decided to terminate Mr. Sorenson; and Mr. Kunkel did not need Mr. Winfield’s permission to do it (TR p. 82, lines 8-13). There is no evidence that Mr. Keil played any role whatsoever in Mr. Sorenson’s termination. Even Mr. Sorenson identified Mr. Kunkel as his own supervisor, and Mr. Winfield as Mr. Kunkel’s, without any mention of Mr. Keil (TR p. 98, lines 5-8). There may be a question as to whether a “project manager” was the same thing as a “Field Supervisor,” but nobody suggests Mr. Keil had any supervisory responsibility over Mr. Sorenson at all, other than Mr. Sorenson himself, despite having failed to name Mr. Keil as one of his supervisors when asked directly. I conclude that any suggestion that Mr. Keil was a “supervisor,” or had managerial responsibility over Mr. Sorenson, is not accurate.

statute.” *Johnson v. Morton Thiokol, Inc.*, 818 P.2d 997, 1000 (Utah 1991). According to the Utah Labor Commission, an at-will employee

. . . can be terminated at any time, for any reason or for no reason at all. In other words, and by way of example, your employer can decide to let you go, even if you are their best employee, even if they don’t give you any warnings, and even if you have actually done nothing wrong.

(www.laborcomission.utah.gov/FAQ/discrimination_in_employment.html).

That is, *unless Mr. Sorenson’s termination was prohibited under the Act*, or under some other law or public policy, the circumstances of his termination, and the reasons for his termination, are irrelevant in this proceeding. Mr. Sorenson introduced considerable evidence about Terracare’s justifications for his termination, suggesting Terracare had advanced different reasons at different times as a pretext for terminating him for his protected activity (*see* JX 3; Complainant’s Post-Hearing Brief, pp. 13-15). But before any of those allegations becomes relevant to the issues before me, the complainant must demonstrate, by a preponderance of the evidence, that he engaged in protected activity. In the absence of protected activity, and so long as it did not violate any other law or public policy, Terracare could terminate Mr. Sorenson’s employment for any reason, no matter how trivial. It could terminate his employment for his failure to wear PPE, even if other employees also failed to wear it. It could terminate him for not carrying his telephone. It could terminate him for nearly missing another worker with his shovel. It could terminate him for eating lunch in the wrong place or at the wrong time. It could terminate him for all of those reasons, for any one of them, for any combination of them, or for no reason at all. It could terminate him without first engaging in progressive discipline. It could terminate him without previous reprimand, and without warning.

II. COMPLAINANT DOES NOT SHOW HE ENGAGED IN PROTECTED ACTIVITY

Mr. Sorenson contends he engaged in two different forms of “protected activity” under the Act when he complained to his supervisors 1) about alleged defects in Terracare vehicles; and 2) about Terracare vehicles not being properly registered in Utah; and a lack of proper insurance, including proof of liability insurance, on Terracare vehicles. He testified he made these complaints orally and in writing.

Terracare acknowledges Mr. Sorenson may have discussed these subjects in a general way with his supervisors, but contends those discussions did not comprise a “complaint,” and therefore did not comprise “protected activity,” under the circumstances of this case.

Terracare argues that “vehicle delivery, maintenance, repair, registration and inspection” were the main activities of Terracare’s start-up phase in Utah, and that Mr. Sorenson was involved in those activities within the scope of his employment (Respondent’s Closing Brief, pp. 13-14). In Terracare’s view, it would be unremarkable for Mr. Sorenson to report, for example, that a vehicle needed maintenance, since reporting on the condition of the vehicles was part of his job. Asked, at the very outset of his testimony, to describe his duties and responsibilities for Terracare, Mr. Sorenson testified “To train and – to hire, train, like Bill said, and make sure everything was safe, and make sure everything was the way it should be. *And trucks, you know, make sure the trucks were ready for the road, and try to be safe*” (emphasis added) (TR p. 95, lines 3-9). In order to make a “complaint” under the Act, in Terracare’s view, it would be incumbent on Mr. Sorenson clearly to indicate that he was reporting something more than a routine need for maintenance or attention before his report would amount to a statutory “complaint.”

I am not aware of any case in which the Secretary has concluded that a report of a safety condition did not comprise a “complaint,” and therefore was not “protected activity,” under the Act. But along the way, some courts have acknowledged such a conclusion is at least theoretically possible. In *Jackson v. CPC Logistics*, ARB No. 07-006 (ARB October 31, 2208), for example, a truck driver complained he was being pressured to complete his log improperly. The ALJ observed that oral internal communications “must be sufficient to give notice that a claim is being filed,” and concluded the complainant’s report was insufficient in that case. The BRB ruled to the contrary, but affirmed the decision on other grounds.

Similarly, Terracare cites this dicta from *Clean Harbors Environmental Services, Inc., v. Herman*, 146 F.3d 12, 22 (1st Cir. 1998):

[I]nternal communications to the employer must be sufficient to give notice that a complaint is being filed and thus that the activity is protected. . . . Clearly there is a point at which an employee’s concerns and comments are too generalized and informal to constitute “complaints” that are “filed” with an employer within the meaning of the STAA. The risk of inadequate notice to an employer that the employee has engaged in protected activity is greater when the alleged protected complaints are purely oral.

Yet, in that case, the court had “no trouble concluding that [the complainant’s] oral and written complaints were sufficiently definite to put [the employer] on notice that he was engaging in protected activity.” *Id.* Still, the court reached this conclusion only after acknowledging that the question of what constitutes a “complaint” under the Act was “real,” and “may be dealt with as a matter of factual analysis.” 146 F.3d at 21.

As discussed above, Mr. Sorenson in this case admitted it was part of his responsibility to “make sure the [Terracare] trucks were ready for the road.” Thus I may conclude, as Terracare argues, that it expected some comments from Mr. Sorenson on the condition of company vehicles in the ordinary course of business. Under these circumstances, a warning from him that a particular vehicle needed some attention might not reasonably be understood as a statement that the vehicle’s operation violated an applicable motor vehicle safety standard or regulation. A truck driver who says to the company president, “I won’t drive this truck until you guys do something about the oil leaking all over the road” might well be making a “complaint” under the Act, while Mr. Sorenson telling a co-worker that a truck was leaking oil likely would not be. It would depend entirely on who said exactly what to whom. Alas, in this case, there is no agreement on any of these matters. To make a fact-specific determination, I must first find the facts.

A. Vehicle Defects

Mr. Sorenson contends he complained, orally and in writing, about hydraulic fluid leaks, brake fluid leaks, and oil leaks on Terracare vehicles, in addition to a defective transmission on a Terracare vehicle (Complainant’s Post-Hearing Brief, pp. 3-4).

1. Written Complaints About Vehicle Defects

The parties agree Mr. Sorenson filled out six “Driver Vehicle Inspection Reports,” or “DVIRs,” during his Terracare employment. All six were received in evidence as Joint Exhibit 2 (JX 2). On three of those forms, Mr. Sorenson commented on the condition of a vehicle. On the fourth, discussed separately, he commented that license plates and registration stickers were missing.

Terracare required its employees, including Mr. Sorenson, to inspect company vehicles before driving them, and to complete and sign a DVIR. The employees left completed DVIRs in an in-box for the mechanic, Peter Keil (TR p. 262, lines 4-17), who decided whether the vehicles were safe to drive (TR p. 259, lines 5-6). Mr. Keil had the authority to remove a vehicle from service if he thought the vehicle unsafe (TR p. 274, lines 16-25). On a DVIR dated October 29, 2013, Mr. Sorenson checked boxes indicating “defects” with the “engine,” “transmission,” “steering,” “tires,” and “emergency equipment,” adding handwritten notations including “Haudraulics *sic*/leaks,” “Need ins. Cards soon,” “1 Write up!,” “No safety gear in yards,” “Brake leaks, oil Low. Oil leaks, hydraulics, and oil leaking on roads.” Just above the signature line on the DVIR, Mr. Sorenson checked another box indicating “CONDITION OF THE ABOVE VEHICLE IS SATISFACTORY” (JX 2, p. 45). On November 7, 2013, Mr. Sorenson completed two DVIRs, both with respect to the same vehicle, truck number 3352. On the first, he checked a box indicating a “defect” in the “engine,” with a handwritten notation “motor is leaking oil.” Again, he also checked the box indicating “CONDITION OF THE ABOVE VEHICLE IS SATISFACTORY” (JX 2, p.

47). On the second – which was also signed by Nomi Davis – Mr. Sorenson checked boxes indicating defects in “engine” and “steering mechanism,” and had written “Engine is leaking oil” and “power steering low fluid.” The “CONDITION OF THE ABOVE VEHICLE IS SATISFACTORY” box was also checked (JX 2, p. 49).

Respondents attach great significance to the “SATISFACTORY” box, which is checked on all of the DVIRs Mr. Sorenson submitted during his Terracare employment (JX 2) (*see* Respondent’s Closing Brief, pp. 12, 14). Mr. Sorenson downplays the significance of the “satisfactory” check mark, arguing that “[n]othing in the C.F.R. or the cases interpreting the STAA supports the notion that a check mark for ‘satisfactory’ magically removes the defects listed in a DVIR from the purview of 49 C.F.R. §§ 396.3, 396.5, 396.7, and 396.11” (Complainant’s Post-Hearing Brief, p. 6).³ Of course the check mark is not dispositive, but Complainant seems to believe it is irrelevant. It is not. The “SATISFACTORY” box is not merely incidental; it serves the important purpose of allowing a motor carrier quickly to distinguish more urgent maintenance needs from less urgent ones. Surely Terracare could reasonably assume a DVIR with the “SATISFACTORY” box checked is materially different from a DVIR on which the box is not checked.

Mr. Sorenson’s DVIRs undoubtedly indicate the vehicles in question needed attention, but, in the context of this case, standing alone, I conclude they do not comprise a “complaint” under the Act. It was Mr. Sorenson’s job to make sure the trucks were ready for the road. He filled out DVIR reports indicating the vehicles in question were in “SATISFACTORY” condition and he left those written reports for the company mechanic, who was not a manager and who did not supervise him. Mr. Sorenson’s motives for checking the “SATISFACTORY” box, whatever they may have been, are not apparent from the face of the document. For these reasons, I conclude the DVIRs, taken in isolation, do not comprise a “complaint” under the Act, and Mr. Sorenson’s writing them and turning them in, without more, therefore does not comprise “protected activity.”

2. Complainant’s Oral Complaints

But at the hearing, Mr. Sorenson testified that the DVIRs themselves were only one element of his reports to management. In addition to the written forms, according to his testimony, he had oral discussions with various other Terracare employees, including his supervisors, as well as the mechanic, Mr. Keil.

³ Complainant goes on to argue that the Eighth Circuit “expressly rejected that argument” in *Maverick Transp., LLC v. United States Department of Labor, Administrative Review Board*, 739 F.3d 1149 (8th Cir. 2014), but that is simply not so. *Maverick* does not involve the interpretation of a DVIR. It involves a refusal to drive as “protected activity,” not the significance of a check-box on a DVIR form.

a. The October 29, 2013, DVIR (JX 2, p. 45)

For example, with respect to the October 29, 2013, Mr. Sorenson testified

Q: The conditions you just described, with regard to the engine, the transmission, and the steering, what conversations did you have with Mr. Kunkel about those conditions?

A: I had probably five. When I did this DVIR, they were all concerned that I was writing all this down. They asked me not to write this stuff down, because they did not want these to get picked up by OSHA.

And, they didn't want to get picked up by the state. They're required, if the state or OSHA comes in, they will look at these, and they didn't want anybody to see these.

Q: When you say they, who are they?

A: Mr. Winfield, Mr. Kunkel, and also the mechanic. The mechanic told me, "I'll get to them, but I'm the only one here, Kelly, and, you know, so you've just got to send these out," they said.

So he was getting told to send me – me to send them out, and I was told by Mr. Winfield and Mr. Kunkel to just drive them, send all the drivers out in them, and they will do it, they will get to it, is what they told me.

...

Q: Mr. Sorenson, on this same DVIR, it looks like the box is checked for condition of the above-vehicle is satisfactory. Do you see that?

A: Yes, I do.

Q: Did you check that box?

A: I did.

Q: Why?

A: Because I was told to just send these drivers out, you know, they'll get to it, and just send the drivers out, and do what I'm told to do, unless I don't want my job.

Q: Who made those statements?

A: Bryan Kunkel.

Q: Did you believe the vehicle itself was in a satisfactory condition?

A: I knew it wasn't, because you can't go out on the road without licensing and insurance cards in them, and bald tires, transmissions not working, hydraulics bleeding off. I knew that you couldn't.

And that's why I wrote this up on the second day I was there, to make them clearly aware that I did not feel comfortable doing it, because I could lose my CDL. And, all those drivers I was training could lose their CDL.

And plus, it could have caused a wreck. You could have – I could have killed somebody.

Q: What specifically did Mr. Kunkel tell you when you orally reported those defects to him?

A: Mr. Kunkel told me that he didn't agree with it, either, but it was all on Bill, because Bill was his boss, and he was doing what Bill told him to do.

And, he just told me to shut up, if I want to keep my job.

...

Q: Do you recall when these conversations with Mr. Kunkel took place?

A: This conversation took place the same day that I did this report. I had it with Kunkel, Mr. Kunkel and Mr. Winfield, and also Mr. Keil.

Q: Where?

A: It took place with Mr. Keil in the shop, because he was working on the other trucks. And with Mr. Kunkel, you know, I just took him to the side and told him.

And Bill, you know, I just mentioned to Bill that we need to get this all done, because you don't want to be on the road with all

these trucks, you know, without insurance or anything like that. You just can't do it.

(TR, p. 106, line 13 – p. 109, line 13). This testimony is significant for three reasons. First, Mr. Sorenson migrates from claiming he had five conversations with Mr. Kunkel to saying he had conversations not only with Mr. Kunkel, but with Messrs. Winfield and Keil as well. Second, Mr. Sorenson avers that all three of them told him to stop making such reports, and to “send out” the vehicles in spite of the defects Mr. Sorenson had reported; and that Mr. Sorenson checked the “SATISFACTORY” box on the DVIR because of an order he received from Mr. Kunkel, an order Mr. Kunkel allegedly attributed to Mr. Winfield.⁴ Third, it supports my conclusion that creating and turning in the DVIR did not amount to a “complaint.” The whole point of Mr. Sorenson’s testimony about this DVIR is that he *wanted* to make a complaint, and he would have stated it more clearly, but for the interference of Messrs. Kunkel, Winfield, and/or Keil.

I asked Mr. Sorenson for some clarification of his testimony with respect to the October 29, 2013, DVIR:

JUDGE LARSEN: All right. My question is before you wrote anything on this piece of paper that we are looking at, had you had any conversations with anybody at TerraCare about the condition of the vehicles?

THE WITNESS: Yes.

JUDGE LARSEN: All right. And, who had you spoken to?

THE WITNESS: It would be the mechanic that was there, because –

JUDGE LARSEN: That would be Mr. Keil?

THE WITNESS: Yeah, because me and Sawyer went over to unload some of the trucks off of a flatbed truck that they brought in from –

JUDGE LARSEN: For whatever reason, it doesn't matter. But, you had spoken to Mr. Keil?

THE WITNES: Yes.

JUDGE LARSEN: You had not spoken to Mr. Kunkel?

⁴ In fact, according to Mr. Sorenson, because “Mr. Kunkel was so mad at me” and Mr. Sorenson “wanted [his] job,” Mr. Sorenson refrained from writing DVIRs on other Terracare vehicles he considered in dangerous condition (TR p. 116, line 17 – p. 117, line 22).

THE WITNESS: Not about – no, not this.

JUDGE LARSEN: And, you had not spoken to Mr. Winfield?

THE WITNESS: No.

JUDGE LARSEN: Okay. Now before you showed this document to anybody else, was the condition-of-the-above-vehicle-satisfactory box checked? Or, was it not checked?

THE WITNESS: Before? Now, say that again?

JUDGE LARSEN: Before you showed this paper to anybody else, did you check that box before you showed it to anybody else? Or did you only check it after you had shown it to someone else?

THE WITNESS: No, I checked it before, because of the fact that I was, you know, taking all these guys out, and I didn't want them not to check it.

(TR p. 190, line 9 – p. 191, line 15). Here, Mr. Sorenson states he completed the first of the four DVIRs – *including* checking the box that reads “CONDITION OF THE ABOVE VEHICLE IS SATISFACTORY” – *before he had ever discussed the condition of the vehicle with Mr. Kunkel or Mr. Winfield*. This directly contradicts his earlier statement that he checked the box on this particular form “[b]ecause I was told” – by Mr. Kunkel, as he would say later – “to just send these drivers out, you know, they’ll get to it, and just send the drivers out, and do what I’m told to do, unless I don’t want my job.” He has testified both that he checked the box because of a direction from Mr. Kunkel, and that he checked the box of his own volition, without any interference from Mr. Kunkel or anyone else. In my judgment, this seriously impairs his credibility as a witness.

Still, Mr. Sorenson directly accused Mr. Kunkel, Mr. Winfield, and perhaps even Mr. Keil of telling him not to write complaints about the vehicles on his DVIR forms:

JUDGE LARSEN: Here is what I am getting at: At some point, if I understood, if I’ve followed everything today, at some point, somebody said to you, “Kelly, if you keep doing this – you better stop doing this, if you want to keep your job.”

THE WITNESS: Yeah, they asked me not to put – keep filling this out, putting all this stuff.

JUDGE LARSEN: Who is they?

THE WITNESS: All three of them.

JUDGE LARSEN: Okay. So Mr. Kunkel said to you –

THE WITNESS: Don't keep writing all this stuff down.

JUDGE LARSEN: “ – if you keep writing all these DVIRs, you're going to lose your job?”

THE WITNESS: Yes.

JUDGE LARSEN: And Mr. Winfield said to you, “If you keep writing all these things down on DVIRs, you are going to lose your job?”

THE WITNESS: Yes.

JUDGE LARSEN: And, Mr. Keil, is he number three?

THE WITNESS: Well, Mr. Keil just said they're just making me –

JUDGE LARSEN: I get it, I get it. So, who is the third person? You said all three.

THE WITNESS: Mr. Keil is the mechanic and, you know, I was going to him and saying, “These trucks don't have license plates on them, Peter.” And, he would be like, “I know.”

JUDGE LARSEN: But, Mr. Keil didn't say to you, “I know, and you had better keep your mouth shut, or you will lose your job.”

THE WITNESS: He pretty much said, you know, “You better just do it.”

JUDGE LARSEN: He did say that?

THE WITNESS: Yes.

(TR p. 191, line 24 – p. 193, line 8).⁵

But Mr. Sorenson was unable to say *when* they had warned or threatened him, or who was present when they did:

⁵ *But see* TR p. 156, lines 6-14, where Mr. Sorenson denies his supervisors told him to stop filling out DVIRs.

Q: Now you testified earlier today that you spoke with Mr. Winfield, Mr. Keil, and Mr. Kunkel five times about the truck, and, that the first time you spoke with them was October 29th.⁶ What are the dates of your other conversations?

A: I don't know, ma'am. I didn't write down the dates. But, I know there was five times, at least.

Q: Well, let's think of the next time. Who else was present?

A: The next time would've been when I filled out the other. I filled out two of them. And, I got in trouble for putting down no insurance, and no licensing on it. I was trying to –

Q: Mr. Sorenson, who was present?

A: -- so it would have been – what?

Q: Who was present the second time that you spoke with one of those three gentlemen about your concerns about the vehicles?

A: Just Peter Keil, Bryan and Bill. There were times when I would just talk to them alone, too. So –

Q: And, that is what I am trying to get at. I want you to focus on the second time, and tell me who was present.

A: Ma'am, you know, I – that's been a lot of years ago, so I couldn't honestly say exactly what time, and where, you know. I can just tell you there was these five times there.

And, I was told by each of them not to do it, to fill them out, and to make a big deal out of it, and tell the drivers. That's all I can tell you. I didn't write it down.

⁶ I presume counsel was referring to Mr. Sorenson's testimony at TR 109, lines 1-5, that he spoke with Mr. Kunkel, Mr. Winfield, and Mr. Keil on the same day he wrote the DVIR in question; and perhaps to Mr. Sorenson's testimony that he spoke to Mr. Winfield on October 29, 2013, at which time Mr. Winfield reportedly told him to take his instructions from Mr. Kunkel (TR p. 118, line 21 – p. 119, line 6).

(TR p. 166, line 17 – p. 167, line 21).⁷ In this iteration of events, Mr. Sorenson is adamant that he had five conversations, but it is not at all clear with whom he had them, or when they occurred. This, too, impairs his credibility.

b. The First November 7, 2013, DVIR (JX 2, p. 47)

With respect to the *first* November 7, 2013, DVIR (JX 2, p. 47), Mr. Sorenson testified

Q: Please read what you wrote on this document.

A: Engine, which means the engine wasn't working properly, or it was leaking oil, and, you know, it was numerous things. And then, I just put, "Motor is leaking oil."

Q: Did you observe the motor leaking oil?

A: Yes.

Q: What specific problems did you observe with the engine?

A: Well, on this one, it was on – at 10:00 is when I put, 10:00. The reason I put 10:00 is because that would've been on the pretrip. I could tell.

What it was is when we get there, it leaves a puddle under the ruck, you know. Right there, there will be a big puddle.

So that means it needed to be fixed. So this would be the pretrip. And then, I filled it out completely, and signed off on it at the end of the day.

Q: Do you recall whether you had any oral discussions regarding this DVIR, or the defects listed in it, with Mr. Kunkel?

A: No, just with Mr. Keil on this one.

Q: What did Mr. Keil say in response?

A: He did tell me he was having a hard time fixing them, because he did not have the proper tools, because it was so early,

⁷ On cross-examination, Mr. Sorenson denied that his supervisors had ordered him to stop writing DVIRs. "They said you could complete them, but don't let the drivers know about what the situation was with the licensing, registration, inspection, and all the stuff that was going on about safety issues with these trucks. Don't encourage them to just keep filling these out" (TR p. 156, lines 6-14).

you know. They did not have the tools to fix things, is what he said to me.

(TR, p. 110, line 12 – p. 111, line 13). As discussed above, the company mechanic was not a manager, so a complaint made solely to him is not “protected activity” under the Act. *Harrison v. Roadway Express, Inc.*, ARB No. 00 048, ALJ No. 1999 STA 37 (ARB Dec. 31, 2002). But this testimony yields so little information about the conversation between the two that I would be hard-pressed to conclude it comprised “protected activity” even if Mr. Sorenson had been conversing with Mr. Winfield instead of Mr. Keil. Mr. Sorenson said something about oil leaks to Mr. Keil; Mr. Keil replied that he was having a hard time fixing trucks because he lacked tools “because it was so early.” I have just as much reason to regard this as an idle workday complaint by Mr. Keil – who, in any case, denies ever having said it, as set forth below – as to regard it as a sinister admission that Terracare was going to put its vehicles on the road whether they were in good repair or not.

c. The Second November 7, 2013, DVIR (JX 2, p. 49)

With respect to the *second* November 7, 2013, DVIR (JX 2, p. 49), Mr. Sorenson testified

Q: Who filled this out?

A: Me.

Q: Is that your signature?

A: Yes, it is.

Q: There is another signature down there. Do you know who that is?

A: That was the gal that I was training that day, and we were both in one of the big trucks. So I had her sign off on it, because she would drive it like half the day, and I would drive it the other half of the day. Her name was Naomi Davis.

Q: Please read the comments on that DVIR.

A: I wrote down engine. I wrote down steering mechanism. And then, I wrote down engine is leaking oil, power steering fluid was low, which means it was leaking.

The power steering unit is leaking. And, if it was leaking out, usually when the power steering goes out, it leaks really bad.

The oil inside heats up and it just comes out really quick. So you, you know, just don't want to drive the truck.

Q: Once again, the box is checked for condition of the vehicle is satisfactory. Did you check that box?

A: I did.

Q: Why did you check that box?

A: Because all three of my bosses told me to, you know, just keep driving them. And, if I wanted to keep my job, to just not make the drivers aware of anything, and just do my job, and send them out.

Q: The two DVIRs we have looked at, the last two that were on pages TerraCare-18 and TerraCare-498, they are both dated November 7th. Do you see that?

A: Yes, I do.

Q: And, they are both for truck number 3352. Do you see that?

A: Yes.

Q: Why did you fill out two DVIRs for the same truck?

A: Because I wanted to make sure that they were really aware of this truck, because it was in bad shape. And, I think I probably jumped in it later on, came back from the shop, then, jumped back in, and went out and trained some more. So, that's what it would've been.

Q: What did you do with these two DVIRs after you filled them out?

A: On these ones, I gave to Mr. Peter Keil.

Q: Do you recall whether you had any oral discussions with Mr. Kunkel, or Mr. Winfield about either of these DVIRs?

A: Not on – not on these two, I didn't. I had already let them know, you know. And, I could tell I was irritating them.

Bryan Kunkel got mad at me, and told me I was causing problems for him. So, I needed to do my job, and quit bringing this stuff up.

So, I just, you know, I wanted my job there, and I really was excited to have my job there, and I liked it. And, I thought I, you know, I was going to have a great job.

So, I did not want to get in trouble. I did not want to, you know, get in trouble. I did not want them not to like me.

(TR, p. 112, line 7 – p. 114, line 5). Here again, Mr. Sorenson acknowledges that by checking the “SATISFACTORY” box, he had, in essence, indicated the vehicle was safe to drive. Here again, although he testified he talked privately with Mr. Keil, he does not say he told Mr. Keil that truck number 3352 was not safe to drive. Also, Mr. Sorenson testifies he did not discuss this DVIR either with Mr. Kunkel or Mr. Winfield, although Mr. Sorenson testifies he was conscious of Mr. Kunkel’s presumably-previous threats. And, curiously, he again refers to “all three of his bosses” having told him to keep driving the trucks, although the evidence shows he had only *two* superiors at Terracare.⁸

d. November 11, 2013, Telephone Conversation with Ms. Robertson

Mr. Sorenson also testified that he had a telephone conversation on November 11, 2013, with Human Resources Director Michelle Robertson in which he told her “about, you know, the problems, the trucks, the safety issues and everything,” and she told him she would discuss them with his supervisors (TR p. 125, line 4 – p. 125, line 12). Ms. Robertson, on the other hand, testified Mr. Sorenson only talked to her about his feelings that a second foreman, Sawyer Goff, was getting preferential treatment from Messrs. Winfield and Kunkel because Mr. Goff had a building key and was allowed to drive a nicer truck. According to her, Mr. Sorenson said nothing about defects in any Terracare vehicles, safety concerns, registration, licensing, or insurance (TR p. 203, line 15 – p. 207, line 15).

B. Complaints About Registration and Insurance

Mr. Sorenson reported problems with registration on the fourth DVIR he completed, dated November 11, 2013 (JX 2, p. 50). He did not note any mechanical or maintenance defects. Just as he had on the other three DVIRs, Mr. Sorenson checked the box indicating “CONDITION OF THE ABOVE VEHICLE IS SATISFACTORY.” With respect to this DVIR, Mr. Sorenson testified

Q: Please read your comment.

⁸ Further muddying the waters, Mr. Sorenson at one point testified that he himself both was, and was not, a “manager,” apparently ending with the conclusion that he didn’t know whether he was (TR p. 155, lines 7-15).

A: I wrote here no plates or up-to-date stickers. And this was towards the end of my employment. I was fired on 11/13, 2013. And, this is 11/11 of 2013.

And, you know, I had still been sending all these drivers out that had CDLs in these trucks. And, a lot of these drivers were saying, "Kelly, where is the licensing, registration, inspection stickers, insurance cards, and, you know, these trucks have bald tires, and we don't feel comfortable driving these trucks, because the hydraulics are bleeding off," and, just a lot of things, transmissions, clutches, all kinds of things.

And, they were all complaining to me. And so, I did this. I put this again, and I got in trouble again for it.

Q: What do you mean, you got in trouble?

A: Mr. Kunkel said, "I don't need this stuff on here," and just warned me again.

Q: What did you mean when you said stickers? What does stickers mean?

A: You can't get licensing in Utah without a safety inspection sticker, which means it's got to go to a reputable mechanic – company that are certified through the State of Utah for stickers for safety.

What you do is you take them in there, and they will, you know, look over the truck to see if it's okay to be out on the road.

And, if you don't have that, you can't get them licensed. You can't get them insured or licensed, because from what I understand, insurance companies will not insure something that's not already licensed.

Q: What vehicle did this particular DVIR pertain to?

A: Ninety-one thirty-eight.

Q: Do you recall what vehicle that was? Make, model?

A: I – I just know it was one of the bigger trucks. You know, they had 12 trucks. And, I think it was one of the Internationals.

Q: What specific conversations about this DVIR did you have with Mr. Kunkel?

A: Just that we haven't got this done, and it's already 11/11 of 2013, which meant that I had been there almost two weeks, and that, you know, I had been sending like eight, nine drivers out in all these trucks.

And, there was no insurance cards, and there was – they didn't have any plates. And, I was worried about, you know, them getting pulled over without plates or insurance.

You know, you can go to jail, if you do not have insurance cards in your truck, and you can't prove there's insurance on them.

You can go – they will put you in jail. They would impound the truck, and off you go to jail, because you're a CDL driver.

(TR, p. 114, line 15 – p. 116, line 16). At several other points in his testimony as well, Mr. Sorenson indicated he had notified his two superiors of problems with registration or insurance (TR p. 101, line 14 – p. 105, line 4; p. 116, lines 2-10; p. 121, lines 11-19; p. 121, line 20 - p. 124, line 3; p. 164, lines 6-19; p. 169, line 19 – p. 170, line 4).

Terracare argues that a complaint about a vehicle being unregistered or uninsured is not a complaint about safety, citing the ALJ's decision in *Forrest v. Transwood Logistics, Inc.*, 2201-STA-43, p. 2 (ALJ, August 7, 2001). There, Judge Price concluded a vehicle's New York Highway Use Tax (HUT) sticker – which the complainant had argued would only be issued after the operator showed documentation related to the safety of the vehicle, and offered proof of insurance coverage – was “a tax and not related to safety in any manner.” Accordingly, a complaint that a vehicle did not have the required HUT sticker did not comprise “protected activity” under the Act. I am hard-pressed to conclude that registration, licensing, and insurance are not related to safety in any manner, but their relationship is secondary at best. Registration, licensing, and insurance are essential primarily for establishing *accountability* for accidents that may occur, rather than militating against accidents in the first instance. From a strictly statistical point of view, an unregistered, unlicensed, uninsured vehicle in pristine mechanical condition, operated with due care, is no more dangerous than a registered, licensed, insured one; and the chances of an otherwise careful driver suddenly behaving recklessly because the lack of a license plate might make it harder for the police to catch him or her are slim. For these reasons I am inclined to agree that a complaint about registration or licensing is not “related to a violation of a commercial motor vehicle safety or security regulation, standard, or order” for purposes of 49 U.S.C. §31105, subsection (1) – although a complaint about the lack of insurance is arguably related to a motor

vehicle *security* regulation, standard, or order. However, at the hearing, not even Mr. Sorenson contended Terracare's vehicles were uninsured in fact, but only that he did not see proof of insurance in them (TR p. 163, lines 3-8). More importantly, as set forth below, Mr. Sorenson's testimony about his complaints is not credible.

C. Conflicting Testimony

Other witnesses contradict Mr. Sorenson's testimony about oral reports and complaints.

a. Ms. Robertson

As indicated above, for example, Ms. Robertson (TR p. 203, line 15 – p. 207, line 15) testified that in her November 11 phone conversation with Mr. Sorenson, he did *not* report defects in Terracare vehicles, or report problems with registration, insurance, or licensing.⁹ Her version of the conversation is supported by a recorded phone message Mr. Sorenson left for her on November 19, 2013 (TR p. 215, line 2 – p. 217, line 11), in which Mr. Sorenson tells Ms. Robertson about his safety concerns, apparently for the first time:

MR. SORENSON: Hey, Michelle. This is Kelly Sorenson. I know I talked to you here about a week and a half or so ago. But I'm sure you've heard they fired me.

I, you know, the concerns I had, where I was talking to you, I mean, I had a bunch of concerns I was hoping I would be able to give to you when you came down on the 19th, like you told me.

But a lot of the concerns were that you guys were illegally driving trucks up in the Cottonwood Heights area for the city.

And, I talked to two people before then. You know, I could lose my CDL, and all the others that I was sending up there was being in jeopardy, because all the trucks were unlicensed, or none of them were registered, and didn't have – weren't safety-inspected for insurance, because none of them had insurance cards.

You know, at that point, I was just, you know, I had concerns, and everything else, a bunch of recordings of Phil and Bryan telling me what to do, which we've got all these drivers up

⁹ Mr. Sorenson's account of this conversation (TR p. 125, line 4 – p. 125, line 12) is irreconcilable with Ms. Robertson's account.

there, there were four to seven guys that were all running in trucks that were illegal.

(TR p. 215, line 21 – p. 216, line 22).

b. Mr. Winfield

Mr. Winfield testified

Q: Did Mr. Sorenson, during his employment, complain to you that the vehicles that TerraCare had were unsafe to drive?

A: No.

Q: Did he complain to you that the vehicles were not registered?

A: No.

Q: Did he complain to you that the vehicles were not inspected?

A: No.

Q: Did he complain to you that they were not insured?

A: I believe he asked me one time about the insurance cards, and I showed him where, if one had disappeared, that there were others available.

(TR p. 332, line 13 – p. 333, line 1).

Mr. Winfield also testified that the Terracare vehicles in Utah were properly inspected (TR p. 317, line 25 – p. 319, line 15), licensed (TR p. 324, line 6 – p. 327, line 14), and insured (TR p. 330, line 24 – p. 332, line 12).

c. Mr. Keil

Peter Keil testified

JUDGE LARSEN: Mr. Keil, while you and Mr. Sorenson were both at TerraCare, did he, if you remember, did he ever say to you in some words, that in his opinion, one or more of TerraCare's vehicles was not safe to operate?

THE WITNESS: No. No, he – he would let me know if there was a situation with a truck.

JUDGE LARSEN: Did you ever have a conversation with him about the quantity of tools that were available to you? Did that ever come up in any discussions with him?

THE WITNESS: No. No.

(TR p. 275, lines 9-18; *see also* TR p. 256, lines 8-17; p. 266, lines 1-4).

Mr. Keil also testified that Terracare's vehicles were properly inspected before they were registered in Utah while Mr. Sorenson was employed (TR p. 257, lines 2-24).

d. Mr. Kunkel

Bryan Kunkel testified

Q: Did Kelly Sorenson have any conversations with you in which he said that none of the vehicles had insurance?

A: I don't recall.

Q: Would you remember, if he did?

A: Pardon me?

Q: Would you remember, if he did?

A: Looking at the vehicle inspection reports, I would hope they would've documented that on the report.

Q: But, my question was did he have any discussions with you?

A: I don't recall.

Q: Did Mr. Sorenson have any conversations with you, in which he complained that none of the vehicles were registered?

A: I don't recall that, either.

Q: Did Mr. Sorenson have any conversations with you, in which he complained that none of the vehicles had been inspected?

A: I don't recall that, either. I had nothing to do with any of those paperworks.

Q: And, whether or not you had anything to do with it, did Mr. Sorenson have any discussions with you that he thought the vehicles were not safe to drive?

A: Again, if he had issues with them, they were to document stuff on the driver vehicle inspection reports.

Q: My question is whether you had any conversations with him, in which he told you that the vehicles were not safe to drive?

A: Again, if he did talk to me about it, I told him to put the stuff on the driver vehicle inspection reports.

Q: Did you ever tell him not to fill out driver vehicle inspection reports?

A: No.

Q: Did you ever tell him to stop putting down comments on driver vehicle inspection reports?

A: No.

Q: Did you ever instruct him that he needed to check off the box that the condition of the vehicle was satisfactory?

A: Many drivers were told to complete the forms, yes.

Q: But, did you instruct him he had to fill – check that box, no matter what the condition of the vehicle was?

A: No, I did not.

Q: Did you ever tell Mr. Sorenson that he needed to do any of those things in order to keep his job?

A: No.

Q: Did you ever threaten his job?

A: No.

(TR p. 290, line 10 – p. 292, line 7).

Ms. Robertson, Mr. Winfield, and Mr. Kyle were all employed by Terracare at the time of the hearing, a factor which could influence their testimony in their em-

ployer's favor. Terracare fired Mr. Kunkel, on the other hand, in December, 2013 (TR p. 276, line 20 – p. 277, line 1).

D. Mr. Sorenson's Credibility

Of course, Mr. Sorenson is no less credible simply because other witnesses disagree with him. But since the burden is on him to show that he engaged in protected activity, and since there is no evidence in the record to corroborate his testimony that he did, he prevails only if his testimony is credible.

For this reason, I have cited his testimony at considerable length above, and I have indicated my reservations about his credibility. There is a slapdash quality to his sworn testimony which I find deeply unsettling. Although he was asked about his conversations with Messrs. Kunkel, Winfield, and even Keil several times, he was never able to say where those conversations took place, or who was present when they did; but he is confident he had at least five such conversations with one or more of them (TR p. 166, line 17 – p. 167, line 21). As discussed above, he has testified both that Mr. Kunkel pressured him to check the "SATISFACTORY" box on the October 29, 2013, DVIR, and that Mr. Sorenson checked the box of his own volition, without discussing it with Mr. Kunkel first. He offered conflicting testimony about how many Terracare vehicles he believed were unsafe (TR p. 98, lines 11-14; p. 99, line 1; p. 159, lines 13-18; p. 161, lines 8-20). His testimony about Mr. Keil's place in the Terracare chain of command is, at best, ambiguous. His testimony about whether his employer ordered him to stop writing DVIRs is confusing and ambiguous. He contradicts himself on the question of whether he did, or did not, see insurance cards in Terracare vehicles (TR, p. 122, line 25-p.123, line 2; p. 162, lines 16-18; p. 170, line 5 – p. 171, line 5). What is more, it appears from the record that Terracare's vehicles *were*, in fact, properly registered (TR p. 324, line 6 – p. 325, line 14), inspected (TR p. 256, line 18 – p. 257, line 24), and insured (TR p. 327, lines 10-14; JX 9; *see also* TR p. 222, line 5 – p. 226, line 3) – and while this does not mean Mr. Sorenson could not reasonably have believed otherwise, it does mean that Terracare had nothing to gain by firing him for having raised the issue, and nothing to lose by allowing him to complain to his superiors.

His re-telling of his November 11, 2013, telephone conversation with Ms. Robertson is not only inconsistent with her testimony about the same conversation, but inconsistent with a recorded voice-mail message he left for her on November 19, 2013. I conclude Ms. Robertson's potential bias as a current employee of Terracare is much less damaging to her credibility than Mr. Sorenson's message is to his, and I conclude Ms. Robertson's account of the telephone conversation is correct.

Mr. Sorenson testified he was supposed to fill out a DVIR whenever he drove a company vehicle (TR p. 100, lines 3-5; p. 101, line 2), and he claimed to have driven 12 Terracare trucks (TR, p. 98, lines 11-14; p. 99, lines 1), but he first acknowledged (TR p. 116, lines 17-20), and then denied (TR, p. 165, line 5), that he had

driven company vehicles without completing a DVIR each time he did. Likewise, he first denied, then admitted, that Mr. Winfield had reprimanded him for violating lunch policy (TR, p. 173, line 21; p. 174, line 14).

Mr. Sorenson may well have had conversations with Mr. Winfield, Mr. Kunkel, and Mr. Keil which in some way touched on vehicle condition, registration, licensing, and insurance. But the evidence does not persuade me that those communications, whatever they may have been, comprised a “complaint” and “protected activity” under the Act. His testimony about these alleged complaints is haphazard, imprecise, and self-contradictory. Consequently, I conclude he has not shown, by a preponderance of the evidence, under the facts of this case, that he engaged in protected activity.

III. FINDINGS OF FACT

I find:

1. The complainant, Kelly Sorenson, was hired by Respondent Terracare Associates, LLC, on October 28, 2013.
2. While employed by Terracare, Mr. Sorenson was a foreman.
3. While he was employed by Terracare, Mr. Sorenson reported to Bill Winfield and Bryan Kunkel.
4. During Mr. Sorenson’s employment there, Terracare also employed, among others, Peter Keil, who was a mechanic.
5. Mr. Keil, during Mr. Sorenson’s employment, was not a manager, and had no supervisory authority over Mr. Sorenson.
6. During his employment with Terracare, Mr. Sorenson created the Driver Vehicle Inspection Reports (“DVIRs”) included in JX 2 and gave them to, or left them for, Peter Keil in the regular course of business.
7. Terracare terminated Mr. Sorenson’s employment on November 13, 2013.
8. During Mr. Sorenson’s employment with Terracare, its commercial vehicles were duly inspected, registered, and insured in Utah.

IV. CONCLUSIONS OF LAW

1. During his employment at Terracare, Mr. Sorenson was an at-will employee under Utah law.

2. The evidence of record does not show, by a preponderance of the evidence, that Mr. Sorenson engaged in protected activity under the Act during his employment with Terracare.

ORDER

Complainant is not entitled to relief under the Act.

SO ORDERED.

CHRISTOPHER LARSEN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and

1978.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1978.110(b).